# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW THOMAS COOK,

Defendant-Appellant.

UNPUBLISHED
May 28, 2009

No. 285211
Allegan Circuit Court
LC No. 07-015431-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of two counts of criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(b) (force or coercion), and one count of assault with intent to commit CSC involving penetration, MCL 750.520g(1). The trial court sentenced defendant to concurrent prison terms of ten to 15 years for each CSC conviction, and five years, seven months to ten years for the assault conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that she had had a romantic relationship with defendant from 2001 to 2004, but that from the time defendant's father died in March 2003 and when she left the area in April 2004, defendant sexually assaulted her, by way of vaginal and oral penetration, too many times to count. Complainant additionally described defendant choking her, pulling her hair forcibly, and calling her such epithets as "slut," "whore," and "bitch" during such violence, adding that defendant, "liked it when I was fighting him". She further testified that, on the occasion that finally drove her away, defendant threatened her with a knife, his designs of sexually exploiting her on that occasion being thwarted only because she screamed and caused defendant's mother to enter the room. Complainant added, "He knows I am deathly scared of knifes." [*Sic.*]

Complaining of the lack of specificity concerning when the alleged incidents of sexual abuse took place, defendant moved before trial to quash the information. The trial court in response reduced the charges to a single count of CSC III involving vaginal penetration, a single count of CSC III based on oral penetration, and a single count of assault based on the knife incident. The trial court denied a motion made at the close of the prosecutor's proofs for a directed verdict predicated on that lack of specificity.

On appeal, defendant argues that the trial court erred in proceeding with the case in light of complainant's inability to specify distinct times for her numerous allegations of sexual aggression, and also that the trial court erred in scoring an offense variable to reflect prolonged pain or humiliation.

## I. Specificity

A trial court's decision concerning the degree of specificity required of criminal charges is reviewed for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 352 (1986).

MCL 767.45(1)(b) requires that a criminal indictment or information contain "[t]he time of the offense as near as may be," while further providing that "[n]o variance as to time shall be fatal unless time is of the essence of the offense." This Court has held that "time is not of the essence in criminal sexual conduct cases . . . ." *People v Stricklin*, 162 Mich App 623, 635; 413 NW2d 457 (1987). Accordingly, CSC cases may proceed where the best the victim can do is to describe in general terms repeated sexual abuse taking place over several weeks or months. See *id.* at 634-635.

Defendant points out that the case law allowing CSC prosecutions notwithstanding the victim's inability to match acts to dates with great specificity involved child victims, and suggests that such an approach is appropriate for child victims only. We disagree. An adult victim of repeated sexual misconduct, taking place over significant time in the context of a close relationship, may also not be able to differentiate the multitude of unlawful acts with great clarity, and to catalogue them on a day-by-day basis, when speaking to the police years after the fact.

In addition, the trial court properly avoided the possibility of defendant's being convicted of multiple counts on the basis of evidence that poorly distinguished between multiple offenses by reducing the charges to three reflecting distinct factual theories—one each of forced vaginal penetration, forced oral penetration, and assault with a knife.

We further note that the nature of the allegations against which defendant would be obliged to defend was made plain to defendant, that the prosecuting attorney endeavored to narrow the time frame involved as best as could be achieved, and that defendant does not explain how his defense might have been otherwise changed had specific acts been ascribed to specific dates. See *Stricklin, supra* at 633-634; *Naugle, supra* at 233-234.

Defendant argues that the lack of specificity in this instance exposes him to successive prosecutions for what could be the same alleged conduct, in violation of double jeopardy principles. However, any such argument is premature unless and until such a successive prosecution occurs. Only in the event of such a development would it become necessary to compare the instant proceedings with the new ones to determine whether defendant was being subjected to multiple prosecutions for the same criminal allegations.

For these reasons, we conclude that the trial court did not abuse its discretion in allowing this case to go forward despite complainant's inability more closely to narrow the possible dates of the assaultive conduct of which she complained.

## II. Offense Variable 7

The trial court scored offense variable (OV) 7, which addresses aggravated physical abuse, at 50 points, the amount prescribed where the offender treated the victim "with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense . . . ." MCL 777.37(1)(a). Subsection (3) of that statute in turn defines "sadism" as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification."

Defendant objected at sentencing, but the trial court stated, "based on the victim's testimony I'm satisfied that . . . the objected to Offense Variable[ was] correctly scored by the Court, and is substantiated by the testimony that the victim gave during the course of the trial." (4/4/08 sentencing transcript, p 4.)

"This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). However, to the extent that a scoring issue calls for statutory interpretation, review is de novo. *Id.*

Defendant emphasizes that the knife attack stemmed from the assault charge, not the CSC allegations, and suggests that it thus could not be used as a factor in scoring the CSC offenses. However, the trial court made clear that the scoring decision was based on complainant's testimony generally, not just the knife incident. The evidence that defendant engaged in a prolonged pattern of sexual abuse, which routinely involved choking complainant, pulling her hair, and subjecting her to abusive language, well supported the conclusion that defendant had treated complainant with conduct "designed to substantially increase the fear and anxiety," or subjecting her to "extreme or prolonged . . . humiliation . . . inflicted to produce suffering or for the offender's gratification." That a knife threat eventually capped this campaign of intimidation and humiliation indicates neither that a fact from one offense was erroneously scored for another, nor that the trial court overly relied on that single evidentiary particular in reaching its scoring decision.

For these reasons, we conclude that the evidence well supported the trial court's decision to score OV 7 at 50 points.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro